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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, AND JAMES EVERETT SMITH,

Petitioners,

vs.

TERI LEWIS AND THOMAS LEWIS, PERSONAL REPRESENTATIVES OF THE ESTATE OF PHILIP LEWIS,

Respondents

On Writ Of Certiorari To The United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

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BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America ("ATLA") is a voluntary bar association whose 55,000 members primarily represent injured persons, including those who are injured by police misconduct or are otherwise victims of civil

rights violations. All parties have consented in writing to the submission of this brief, and the appropriate letters of consent have been filed with this Court.[1] ATLA believes its broad, nationwide perspective can be of aid to this Court in its consideration of governmental responsibility for decisions which jeopardize public safety.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case presented by the Respondents.

SUMMARY OF ARGUMENT

High-speed police pursuits are an extremely dangerous governmental activity. There is a danger to the lives of both the participants and innocent people in the area of the pursuit. High-speed pursuits frequently end with an accident. A 1992 study in Illinois found that 18% to 44% of pursuits resulted in accidents, 5% to 24% resulted in injury, and 1% to 3% ended in death. The majority of police pursuits are for traffic offenses, 52% to 63% in the Illinois study. Approximately the same number of people die as a result of police pursuits in the United States as die from police shootings. A clear standard regulating pursuits is needed to reduce the number of tragedies from pursuits.

Police pursuits which reflect deliberate indifference to, or reckless disregard for, a person's right to life or bodily integrity should be held to violate the Fourteenth Amendment. The deliberate indifference or reckless disregard

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[1] Pursuant to Rule 37.6, Amicus Curiae discloses that no counsel for a party authored any part of this Brief, not did any person or entity other than Amicus Curiae, its members, or its counsel make any monetary contribution to the preparation or submission of this Brief.

standard is easily defined and well-known to the law. This is a stringent standard to be applied to uniquely governmental activities. It does not threaten to constitutionalize tort law. Under the deliberate indifference or reckless disregard standard, police officers will be liable for violating victims' due process rights only when the police officers consciously disregard a substantial risk of harm during the course of a high speed pursuit.

The "shocks the conscience" standard fails to place any meaningful restrictions on a police officer's behavior during the course of a high speed pursuit. In practice, the "shocks the conscience" standard gives police officers virtual immunity from constitutional liability for all actions occurring during the course of a pursuit, no matter how egregious their actions.

ARGUMENT

POLICE OFFICERS' ACTIONS DURING HIGH SPEED PURSUITS MAY VIOLATE THE SUBSTANTIVE DUE PROCESS RIGHTS OF A VICTIM INJURED DURING THE COURSE OF A POLICE PURSUIT IF THE OFFICERS DISPLAY DELIBERATE INDIFFERENCE OR RECKLESS DISREGARD

Police pursuits are dangerous.[2] There are nearly forty motor vehicle accidents every day in the United States as a

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[2] Amicus understands that Solutions to the Tragedies of Police Pursuits (STOPP) is filing an Amicus Brief focusing on statistical analysis of pursuits. That material will not be duplicated here, but a few facts are important: The National Highway Safety Traffic Administration has

result of police pursuits There is a pursuit-related death somewhere in this country almost every day. The ability to pursue suspects is a necessary police function, given the primary mission of law enforcement - to protect lives and to protect the public. Nevertheless, a police officer's decision to begin a pursuit and to continue a pursuit requires consideration of the risk to human life as a result of the pursuit. In light of the threat to life from a pursuit, the decisions made by police officers in pursuits directly implicate the protection of the due process clause of the Fourteenth Amendment.[3]

Negligence by governmental employees is a matter of state tort law; it is not a violation of the due process clause. *Daniels v. Williams*, 474 U.S. 327 (1986). However, in *Daniels* this Court expressly reserved the question "whether something less than intentional conduct, such as recklessness or 'gross negligence', is enough to trigger the protections of the Due Process Clause." *Id.* at 334 n.3. Amicus submits that the proper standard to be applied in substantive due process police chase cases is "deliberate indifference" to or "reckless disregard" of the known dangers of a pursuit. This standard provides protection from needless risk to life without constitutionalizing tort law.

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documented 5306 deaths occurring during the course of pursuits in the last sixteen years. A study of police pursuits in Illinois for the AAA Foundation for Traffic Safety found that between 18% to 44% of pursuits resulted in accidents, 5% to 24% resulted in injury and 1% to 3% ended in death. The majority of police pursuits were initiated for traffic offenses, 52% to 63%. Studies consistently show that the majority of police pursuits are initiated for traffic offenses.

3 This Court has already decided that unless an officer intends a seizure police pursuits do not implicate the Fourth Amendment. *Brower v. County of Inyo*, 489 U.S. 593 (1989).

All of the lower courts which have considered the issue have held the improper conduct of police officers during a high speed pursuit may violate an injured party's Fourteenth Amendment substantive due process right to life.[4] However, there is a conflict among the Circuits with respect to the proper standard to be applied in substantive due process police pursuit cases. Some courts have applied the deliberate indifference or reckless disregard standard while others have required that the police conduct meet the "shocks the conscience of a civilized society" standard. Amicus submits that the Ninth Circuit correctly applied the deliberate indifference or reckless disregard standard.[5]

In all pursuits the need for the immediate apprehension of a suspect due to his danger to the public must be weighed against the risk to public safety created by the pursuit. Indifference to the risks to public safety threatens members of the public. The deliberate indifference standard is capable of definition so that it can be incorporated into police training. Permitting liability for deliberate indifference to the risk of harm to human life will, in the view of Amicus, help to reduce the number of tragedies from pursuits.

This Court recently discussed the deliberate indifference standard in *Board of County Commissioners v. Brown*, ___ U.S.___, 117 S.Ct. 1382 (1997). Justice O'Connor noted in *Brown* that "deliberate indifference" is a stringent standard of fault. *Id.* at 1391. Justice O'Connor further opined that to satisfy the deliberate indifference standard requires proof that

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4 See, e.g., *Evans v. Avery*, 100 F.3d 1033 (1st Cir. 1996); *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996); *Fagan v. City of Vineland*, 22 F.3d 1296 (3d Cir. 1994) (en banc); *Medina v. City and County of Denver*, 960 F. 2d 1493 (10th Cir. 1992).

5 *See* Nahmod, *Civil Rights and Civil Liberties Litigation*, §13.10, 1996 Supp. (Shepard's/McGraw Hill, Inc, 3d. ed.).

a municipal actor disregarded a known or obvious consequence of his action. *Id.* Amicus submits that the deliberate indifference standard is the appropriate constitutional standard for police pursuits.

A well-reasoned definition of "reckless disregard" was provided in *Medina v. City and County of Denver*, 960 F.2d 1493 (10th Cir. 1992). As the Tenth Circuit stated:

> Reckless intent does not require that the actor intended to harm a particular individual; reckless intent is established if the actor was aware of a known or obvious risk that was so great that it was highly probable that serious harm would follow and he or she proceeded in conscious and unreasonable disregard of the consequences. [citation omitted]. Thus, reckless intent involves disregard of a particular risk rather than intent to cause a particularized harm.

Id. at 1496.

The Restatement (Second) of Torts, §500 (1965), indicates that reckless indifference exists when a person acts:

> in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

The Model Penal Code, §2.02(2)(c), similarly defines "recklessness" as conscious disregard of "a substantial and unjustifiable risk."

Petitioner argues that this Honorable Court's decision in *Collins v. Harker Heights*, 503 U.S. 115 (1992), mandates rigid adherence to the "shocks the conscience" standard in all substantive due process cases. This is incorrect. In *Collins*, this Court held that a governmental employer's duty to provide its employees with a safe working environment was not a substantive component of the due process clause. *Id.* at 130. This Court was understandably reluctant to expand the concept of substantive due process into new areas such as the workplace, and noted that the plaintiff's claim was unprecedented. *Id.* at 127.

The plaintiff's claim in *Collins* was analogous to a "fairly typical state law tort claim" alleging that a municipal employer breached a duty of care to its employee. *Id.* at 128. This Court concluded that the plaintiff's complaint alleged omissions by the city that could not "properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense." *Id.* The Court in *Collins* did not address the question of whether the defendant's actions in a particular case should be judged by the standard of "reckless disregard," "deliberate indifference," "arbitrariness" or "shocks the conscience."

Amicus does not argue that anyone injured in an automobile accident with a vehicle driven by a government employee has a constitutional claim, even if the employee is a police officer. The due process clause is implicated when a police officer makes the *decision* to engage in a pursuit and makes the *decision* to continue a pursuit. The prohibited conduct is not simple negligence; a *decision* is made to pursue a suspect and a *decision* is made to continue the pursuit.[6]

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[6] A simple automobile accident with a police car that is not engaged in a pursuit would not implicate the victim's constitutional rights under this standard. The uniquely governmental function of police pursuits, the fact

These decisions should be made to protect the general public taking into account the risk to the public by the pursuit. When the decision to pursue is made with deliberate indifference to or in reckless disregard of the likely consequences of the pursuit and an injury results, the due process clause has been violated.

While the Third Circuit adopted the "shocks the conscience" test in *Fagan v. Vineland*, 22 F.3d 1292 (3d Cir. 1994), the careful and scholarly dissent by Judge Cowen (joined by three other judges) demonstrates both the limited reach of *Collins* and the inappropriateness of the "shocks the conscience" standard.[7]

As Judge Cowen points out, the Court in *Collins* used the phrase "shocks the conscience" only once, as a characterization of the plaintiff's contention, and only once referred to "conscience-shocking" behavior. *Id.* at 1312. On that occasion the phrase was not used exclusively, but in the disjunctive with "arbitrary." Moreover, the predominant phrase used to assess the substantive due process violation in *Collins* was whether the city's action was "***arbitrary***".

In *Collins*, the Court held: 1) that its "refusal to characterize the city's alleged omission in this case as

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an intentional decision is made to pursue and the risk of harm distinguish this situation.

7 The Petitioner's reliance on the Third Circuit's decision in *Fagan* as authority that *Collins* mandates the application of the "shocks the conscience" test to all substantive due process cases is questionable due to the recent Third Circuit case of *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996). In *Kneipp*, the Third Circuit declined to apply the "shocks the conscience" test in a substantive due process "state created danger case" and held that the "shocks the conscience" standard was confined to substantive due process police chase cases. *Id.* at 1207-1208.

arbitrary in a constitutional sense rests on the presumption that the administration of Government programs is based on a national decision making process," 503 U.S. at 128; 2) that the petitioner "has not alleged that the deprivation of this liberty interest was arbitrary in the constitutional sense," *Id.* at 129; and 3) that "the city's alleged failure to train and warn did not constitute a constitutionally arbitrary deprivation." *Id.* at 130. It is significant to note that the last substantive sentence of the *Collins* opinion concludes that "the city's alleged failure to train or warn its sanitation department employees was not *arbitrary* in a constitutional sense." *Id.*

No reference to the "shocks the conscience" standard was made in any of these portions of the opinion. It is submitted that if the language used by the *Collins* Court could be read to establish implicitly the standard for proving a substantive due process violation, that standard should be arbitrariness.

Reckless conduct during the course of a high-speed pursuit is tantamount to arbitrary governmental activity. Police pursuits involve the exercise of governmental power through the use of fully marked police vehicles, police sirens and lights as well as laws which permit police officers to violate standard rules of the road when necessary for police business. Black's Law Dictionary defines "arbitrary" as:

> In an unreasonable manner, as fixed or done capriciously or at pleasure. Without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic.

Black's Law Dictionary 104 (6th ed. 1990).

Reckless conduct is established when an actor is aware of an obvious risk that was highly probable to lead to serious harm and proceeded in unreasonable disregard of the consequences. *Fagan*, at 1325. By this definition, reckless conduct during the course of a police pursuit is tantamount to arbitrary governmental activity.

This Court did not establish the "shocks the conscience" test as the substantive due process standard in *Rochin v. California*, 342 U.S. 165 (1952). The use of the phrase "shocks the conscience" in *Rochin* at most indicates that conduct that "shocks the conscience" would suffice to state a claim of constitutional deprivation, it did not hold that this was the standard of proof required for a constitutional violation.

The *Rochin* Court did not inquire into what would be the minimum requirement for establishing a substantive due process violation. Moreover, the "shocks the conscience" test was never used extensively, even in exclusionary rule cases, because of the Court's subsequent decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), which established Fourth Amendment standards as controlling in this area. Judge Cowen concluded in *Fagan* on the basis of an inclusive historical analysis that "*Rochin* thus no longer has any relevance in situations analogous to those in *Rochin* itself; it lasts primarily as a source from which people quote the catch phrase 'shocks the conscience.'" 22 F.3d at 1318.

The "shocks the conscience" test is incapable of definition. As even the majority opinion in *Fagan* was obliged to recognize, it involves at best an "amorphous and imprecise inquiry." 22 F.3d at 1308. On the other hand, "reckless disregard" and "deliberate indifference" are standards well-known to the law and subject to sensible definition.

From the inception of the "shocks the conscience" standard in *Rochin*, Justices of this Court have criticized it as a constitutional standard. In Justice Black's concurrence in *Rochin*, he questioned the validity of the "shocks the conscience" standard, arguing that there was no constitutional authority for the Court to decide cases based on its notion of civilized decencies. *Id.* at 176. Further, Justice Black predicted that "the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights." *Id.* at 177. Justice Douglas's concurrence in *Rochin* also questioned the validity of a constitutional "shocks the conscience" test. As Justice Douglas noted, the "shocks the conscience" test will "make the rule turn not on the Constitution but on the idiosyncrasies of the judges who sit here." *Id.* at 179.

Just one year after *Rochin*, a plurality of this Court in *Irvine v. California*, 347 U.S. 128 (1953), criticized the *Rochin* Court for failing to analyze the case in terms of "search and seizure" and declined to follow it. *Id.* at 133. In a concurring opinion in *Irvine*, Justice Clark criticized the "shocks the conscience" test:

> [The shocks the conscience test] makes for such uncertainty and unpredictability that it would be impossible to foretell -- other than by guesswork -- just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this *ad hoc* approach is simply that when five Justices are sufficiently revolted by local police action a conviction is overturned and a guilty man may go free. *Rochin* bears witness to this.

Id. at 138.

Later, in *Boddie v. Connecticut*, 401 U.S. 371 (1971), Justice Black again criticized the "shocks the conscience" test in his dissent:

> With a "shock the conscience" test of constitutionality, citizens must guess what is the law, guess what a majority of nine judges will believe fair and reasonable. Such a test willfully throws away the certainty and security that lies in a written constitution, one that does not alter with a judge's health, belief, or his politics.

Id. at 393.

Even after *Collins*, this Court has criticized the "shocks the conscience test" and questioned its usefulness. As Justice Scalia stated in his concurring opinion in *Herrera v. Collins*, 113 S.Ct. 853 (1993):

> If the system that has been in place for 200 years (and remains widely approved) 'shocks' the dissenters' consciences [citation omitted] perhaps they should doubt the calibration of their consciences, or, better still, the usefulness of 'conscience-shocking' as a legal test.

Id. at 875.[8] The "shocks the conscience" test has also been criticized by Circuit Courts of Appeal over the years.[9]

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[8] *See also generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U.Chi.L.Rev. 1175 (1989).

[9] For cases criticizing the "shocks the conscience" standard see generally: *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996); *Fagan v. Vineland*, 22 F.2d 1296, 1308-1309 (3rd Cir. 1994); *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994); *Mansfield v. Mansfield*, 988 F.2d 1469, 1478 (6th Cir 1993); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992); *Cassady v. Tackett*, 938 F.2d 693, 697-98 (6th Cir. 1991); and *Braley v. City of Pontiac*, 906 F.2d 220, 226 (6th Cir. 1990).

In addition to relying upon *Collins*, Petitioner attempts to argue that other workplace safety cases support the application of the "shocks the conscience" standard to substantive due process police chase cases. *See Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995).

As previously argued, *Collins* does not mandate the application of a "shocks the conscience" standard. However, Amicus submits that even if *Collins* and *Uhlrig* do support a "shocks the conscience" standard, it should not be applied in substantive due process police chase cases as these cases are factually inapposite. In *Collins* and *Uhlrig*, the plaintiffs alleged that the failures of their government employers in the workplace amounted to a violation of their substantive due process rights. This Court in *Collins* noted that such claims were unprecedented.

> This Court and the lower courts have been reluctant to expand the protections of the Fourteenth Amendment to employment settings because employment is not a uniquely governmental function. Accordingly, a government employer is not liable for violating an employee's substantive due process rights unless its conduct is so outrageous as to shock the conscience of a civilized society. The "shocks the conscience" standard has been interpreted to require conduct that is so outrageous that very rarely has police conduct been found to meet the standard.

In *Tennessse v.Garner*, 471 U.S. 1 (1985) this Court noted that:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape.

Id. at 11.

If it is unconstitutional to use deadly force on non-dangerous felons, police officers should not have unbridled discretion in pursuing non-dangerous traffic offenders when there is a high probability of serious injury or death. Police pursuits pose a danger to innocent civilians who happen to be in the area of the pursuit as well as to those suspected only of civil motor vehicle infractions. Surely the Constitution should provide as much protection to the right to life of those who are not suspected of criminal wrongdoing as it provides to felony suspects.

Applying constitutional restrictions on the actions of police officers during the course of pursuits is the only way to reduce the number of lives lost during the course of pursuits. Applying a "shocks the conscience" standard does not place any meaningful restrictions on police pursuits. The reality is that when the "shocks the conscience" standard has been applied to police pursuits the actions of the police officers -- no matter how egregious -- fail to reach the amorphous "conscience shocking" level. As a result, police officers are virtually immune from constitutional liability for their actions during a high-speed pursuit.[10]

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[10] For example, in *Temkin v. Frederick County Commissioners*, 945 F.2d 716 (4th Cir 1991), the facts were as follows: 1) the officer observed a vehicle squeal its tires while leaving a gas station; 2) the officer pulled behind the vehicle and engaged in a high-speed pursuit; 3) during the course of the pursuit, the officer learned that the suspect was suspected of stealing $17.00 worth of gas; 4) the chase occurred on a narrow two lane road of varying population densities; 5) the speeds of the vehicles in the pursuit ranged from 65 to 105 miles per hour; 6) at the time of the chase, a carnival was taking place and cars were parked on the sides of the road; 7) the chase concluded when the suspect lost control of his vehicle, crashing into the plaintiff's vehicle (an innocent third party); and 8) the police officer was in such hot pursuit that the police vehicle collided with the plaintiff's vehicle at approximately 60 miles per hour. *Id.* at 718. Despite these egregious facts, the police officer's motion for summary judgment was granted because the court held that the actions did not "shock the judicial conscience." Amicus submits that if the foregoing facts do not even create a genuine issue of material fact as to whether the officers' actions "shock the conscience," the "shocks the conscience" standard can never be satisfied and police officers are virtually immune from liability for actions during the course of pursuits.

Given that the "shocks the conscience" test is incapable of definition and does not provide a workable standard within which to analyze substantive due process cases, Amicus submits that it should be expressly rejected as a constitutional standard. On the other hand, the "reckless disregard" or "deliberate indifference" standard is one well-known in civil rights jurisprudence and capable of sensible definition.

Under the "reckless disregard" or "deliberate indifference" standard, law enforcement agencies will properly be held liable for the tragedies that result when their officers participate in high-speed chases in conscious disregard of an obvious risk to human life. Since police officers' primary responsibility is to protect the public and human life, no less should be expected or tolerated.

CONCLUSION

Based on the foregoing argument and reasoning, Amicus respectfully asks this Court to affirm the Ninth Circuit Court of Appeals and hold that the proper standard to be applied in substantive due process police chase cases is reckless disregard or deliberate indifference to the attendant risk of injury or death.

Respectfully submitted,

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